IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL REVISION APPLICATION NO. 68 OF 2005

Ramsuresh Gaya Prasad .. Petitioner

Vs.

Municipal Corporation of
Gr. Mumbai. .. Respondent

Mr. Omprakash Pandey i/by M/s. Pandey and Co. for Petitioner.
Ms. G.S. Joglekar for Respondent.

CORAM: B.H. MARLAPALLE, J.

Date : June 27, 2005.

P.C.:

1. Heard Mr. Pandey, the learned counsel for the petitioner-decree holder and Ms. Joglekar, the learned counsel for the respondent-corporation.

2. Rule. Ms. Joglekar waives services. By consent of the parties the Civil Revision Application is taken up for hearing forthwith.

3. The L.C. Suit No.7805 of 1995 came to be decree by the City Civil Court at Mumbai on 14/8/2000

in terms of prayers (a) and (b) under Order 8 Rule 5(2) of the C.P.C. The said prayers read as under :-

> (a) That this Hon'ble Court be pleased to declare that the plaintiff entitled to carry on his Pan Bidi, Cigarette and Chocolate Business in the suit stall adm. 1x1-1/2 Sq. Mtrs. situate at on the footpath of Vidhan Bhavan Marg, Bombay - 400 021 and defendants have no right of authority to prevent the Plaintiff from carrying on the said business and/or to demolish and/or remove the suit Stall without following the due process of law;
>
> (b) That the Defendants their servants, agents, representatives and person or persons claiming through them be restrained by an order and permanent Injunction of this Hon'ble Court from demolishing and/or removing the suit Stall i.e. Wooden Stall adm. about 1x1-1/2 Sq.Mtrs. situate on the side of footpath of Vidhan Bhavan Marg, Near Union Bank Building, Nariman Point, Bombay - 400 021 and/or from preventing and/or obstructing and/or interfering with the Plaintiff's Pan Bidi, Cigarette, Chocolate business in the said suit stall in any of manner whatsoever without following due process of law:

4. Almost after four years the decree holder filed Execution Application No.661 of 2004 in the said L.C. Suit No.7805 of 1995. Similarly, the respondent-corporation also took out Notice of Motion No.321 of 2005 on or about 27/1/2005. By the impugned

order dated 22/2/2005, the learned Judge of the City Civil Court at Mumbai was pleased to reject Execution Application No.661 of 2004 filed by the petitioner-decree holder and the Notice of Motion No.321 of 2005 taken out by the respondent-corporation was made absolute in terms of prayer clause (a). Thus, the suit has been restored on the file and directed for disposal afresh on merits.

5. Mr. Pandey, the learned counsel for the petitioner-decree holder states that he would not have a grievance if the Execution Application taken out by him was rejected. The main challenge raised in this Civil Revision Application by the decree holder is to the extent of Notice of Motion No.321 of 2005 having been made absolute in terms of prayer clause (a). The said Notice of Motion has been allowed and the decree passed under Order 8 Rule 5(2) of C.P.C. has been set aside and the suit has been restored to file. Mr. Pandey placed reliance on the decision of Division Bench of this Court in the case of Dhanwantrai R. Joshi and ors. vs. Satish J. Dave and ors. reported in **1998 (3) Mh.L.J. 924** in support of his

contention that when the decree is passed under Order 8 Rule 5 or 10 of C.P.C. an application under Order 9 Rule 13 is not tenable and in such a case the remedy for the Judgment Debtor is to file an appeal against such a decree.

6. A perusal of the decree passed on 14/8/2000 in L.C. Suit No.7805 of 1995 clearly shows that it was a decree passed under Order 8 Rule 5(2) of C.P.C. and if the respondent-corporation was of the view that the same decree could not be executed in view of the decision rendered by the apex court subsequently, the remedy for the Corporation was not by filing an application under Order 9 Rule 13 of C.P.C. The trial Judge was, therefore, not within her powers to entertain Notice of Motion No.321 of 2005 and consequently setting aside the decree dated 14/8/2000 so as to restore the L.C. Suit No.7805 of 1995. To that extent the impugned order calls for interference in view of the law laid down by the Division Bench of this Court in Dhanwantrai R. Joshi’s case (Supra). In any case the order rejecting the Execution Application No.661 of 2004 does not call for any

interference.

7. In the result, this Civil Revision Application succeeds partly and para 3 of the impugned order hereby stands deleted. The impugned order consequently stands modified as under :-

(a) The Execution Application dated 8/10/2004 is rejected and Notice of Motion taken out under Order 21 Rule 22 is disposed of accordingly.

(b) Since the Plaintiff’s Stall is in the Non-Hawking Zone and is required to be either removed or shifted, the Plaintiff is allowed to have it shifted to Hawking Zone upon following prescribed procedure in making an application before the Hawking Committee. The plaintiff shall submit his application to the Hawking Committee set up by the Defendant-Corporation within two weeks from today.

(c) The Hawking Committee shall consider the application of the plaintiff within two weeks of it being made.

(d) The plaintiff shall pay the requisite charges for shifting his stall in the Hawking Zone.

(e) If the Hawking Committee grants the plaintiff a place in the Hawking Zone, the grievance of the plaintiff shall stand resolved accordingly and if the Hawking Committee does not grant the plaintiff any place in the Hawking Zone on consideration of the facts of the plaintiff's case, execution proceedings to continue.

. Rule made absolute in terms of above directions with no order as to cost.

(B.H. Marlapalle,J.)